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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

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NO. 72-1126

CLEVE M. HATTERSLEY,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

• • •

Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

• • •

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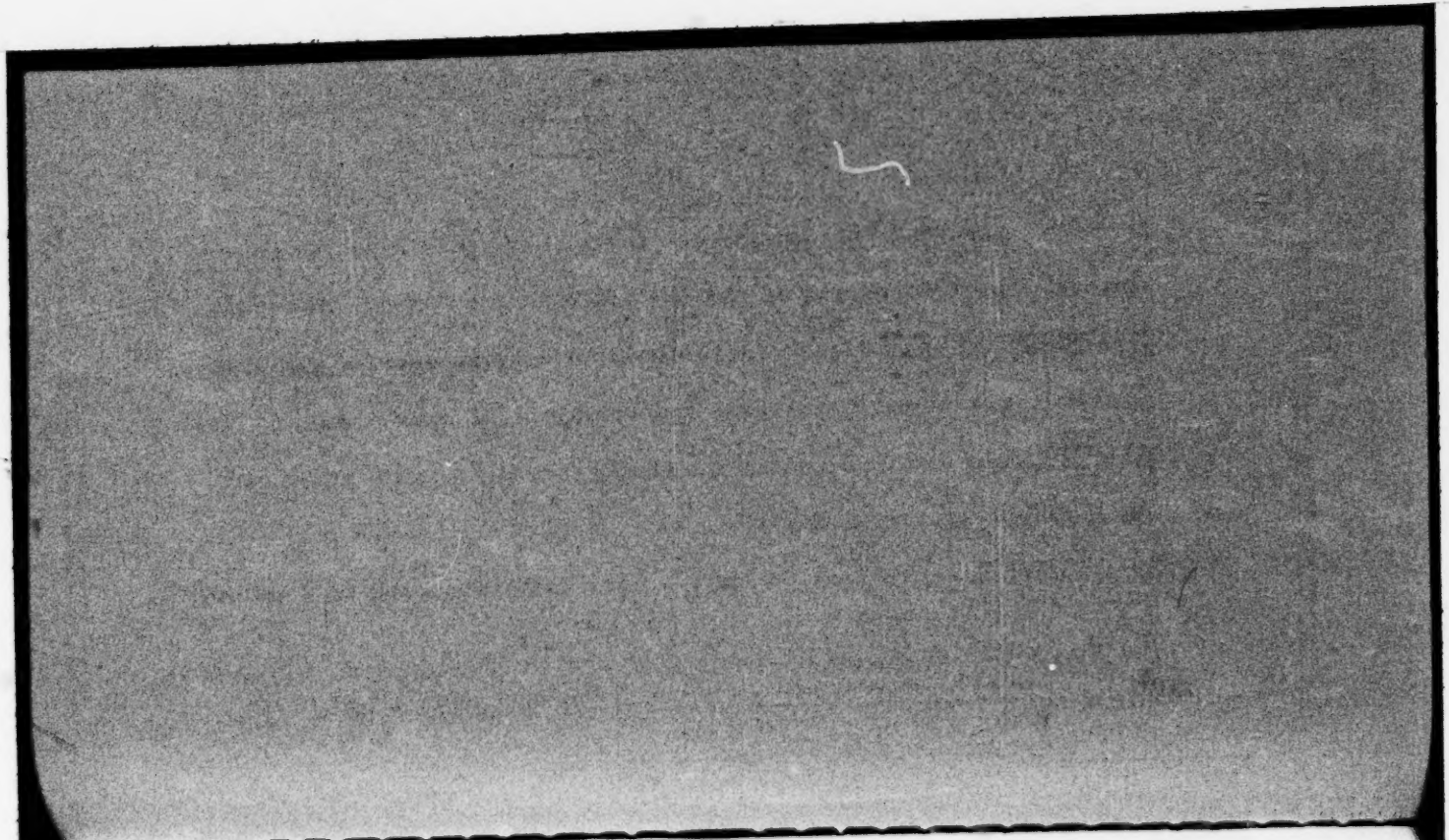

SUBJECT INDEX

Page

TABLE OF CASES i

CONSTITUTIONAL PROVISIONS iii

STATUTES INVOLVED iii

OTHER AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

Challenge to Article 725b Vernon's Annotated Penal Code 5

Challenge to Seizure and Search 6

Statement of Facts 7

REASONS FOR GRANTING THE WRIT 8

I. Indiscriminately Including Marijuana With Dangerous Narcotic Drugs and Providing Identical Penalties for Their Possession Is an Unreasonable and Discriminatory Legislative Scheme That Poses Serious and Timely Constitutional Questions That Need Resolution 9

II. This Case Raises a Significant Constitutional Question Concerning Application of Fourth Amendment Requirements to a Warrantless Search Based Upon a First Time Informant 19

CONCLUSION 20

SIGNATURE OF COUNSEL 20
CERTIFICATE OF SERVICE 21
PPENDIX A – OPINION AND JUDGMENT OF THE COURT OF CRIMINAL APPEALS OF TEXAS 22

TABLE OF CASES

Page

Abie State Bank v. Weaver
282 U.S. 765, 51 S. Ct. 252 (1931) 14

Aguilar v. Texas,
378 U.S. 108, 84 S. Ct. 1509 (1964) 19

Baker v. State,
58 S.W.2d 534 (Cr. App., 1933) 9

Beck v. Ohio,
379 U.S. 89, 85 S. Ct. 223 (1964) 19

Broom v. State,
463 S.W.2d 220 (Cr. App., 1970) 6

Capuchino v. State,
389 S.W.2d 296 (Cr. App., 1965) 13

Coyne v. State,
485 S.W.2d 917 (Cr. App., 1972) 16

Curry v. State,
459 S.W.2d 644 (Cr. App., 1970) 13

Edwards v. So. Carolina,
372 U.S. 229, 83 S. Ct. 680 (1963) 19

English v. Miller,
341 F. Supp. 714 (E.D. Va., 1972) 14

Fawcett v. State,
127 S.W.2d 905 (Cr. App., 1939) 12

Fletcher v. State,
282 S.W.2d 230 (Cr. App., 1955) 13

Gonzales v. State,
293 S.W.2d 786 (Cr. App., 1956) 13

Gonzales v. State,
323 S.W.2d 55 (Cr. App., 1959) 13

Hernandez v. State,
129 S.W.2d 301 (Cr. App., 1939) 13

Leary v. United States,
395 U.S. 6, 89 S. Ct. 1532 (1969) 13

Lindsey v. Natural Carbonic Gas Co.,
220 U.S. 61, 31 S. Ct. 337 (1911) 16

Locke v. State,
329 S.W.2d 873 (Cr. App., 1959) 13

Massiate v. State,
365 S.W.2d 802 (Cr. App., 1963) 13

McLaughlin v. Florida,
379 U.S. 184, 85 S. Ct. 283 (1964) 17

Miller v. State,
458 S.W.2d 680 (Cr. App., 1970) 6

People v. McCabe,
49 Ill.2d 338, 275 N.E.2d 407 (1971) 6, 15, 18

People v. Sinclair,
387 Mich. 91, 194 N.W.2d 878 (1972) 15, 18

Ramirez v. State,
125 S.W.2d 597 (Cr. App., 1938) 12

Reyna v. State,
434 S.W.2d 362 (Cr. App., 1968) 6, 13

Sam v. State,
500 P.2d 291 (Okla. Cr. App., 1972) 16

Sanders v. State,
482 S.W.2d 648 (Cr. App., 1972) 6, 16

Shapiro v. Thompson,
394 U.S. 618, 89 S. Ct. 1322 (1969) 16

Skinner v. Oklahoma,
316 U.S. 535, 62 S. Ct. 1110 (1942) 17, 18
Spangler v. State,
117 S.W.2d 63 (Cr. App., 1938) 10
Spinelli v. U.S.,
393 U.S. 410, 89 S. Ct. 584 (1969) 19
State v. Kantner,
493 P.2d 306 (Haw., 1972) 16
State v. Zornes,
469 P.2d 552 (Wash., 1970) 14, 18
U. S. v. Harris,
403 U.S. 573, 91 S. Ct. 2075 (1971) 20
Valdez v. State,
117 S.W.2d 459 (Cr. App., 1938) 12
Whiteley v. Warden,
401 U.S. 560, 91 S. Ct. 1031 (1971) 19

CONSTITUTIONAL PROVISIONS

Page

United States Constitution:
Fourth Amendment 2
Eighth Amendment 3
Fourteenth Amendment 3

STATUTES INVOLVED

Article 725b Vernon's Annotated Penal Code 3
Article 726d, Sec. 15(a) Vernon's Annotated Penal Code 17
Acts 1905, p. 45 9

Acts 1931, 42d Leg., p. 154, ch. 97 9
Acts 1933, 43d Leg., p. 609, ch. 204 10
Articles 720-725 Vernon's Texas Penal Statutes, 1936 edition 10
Article 725a Vernon's Texas Penal Statutes, 1936 edition 10
Acts 1937, 45th Leg., p. 333, ch. 169 11

OTHER AUTHORITIES

Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings
1925 Handbook 975-976, 978 11
1928 Handbook 322, 323, 325 11
1929 Handbook 333 11
1039 Handbook 485, 487, 493 11
1930 Handbook 126-127 11
1931 Handbook 390, 392, 398-399 11
1932 Handbook 95-107 11
1932 Handbook 325-326 11
1937 Journal of Texas House of Representatives
House Journal p. 328 12
House Journal p. 1543 12
"Marijuana in Texas," A Report to the Senate Interim Drug Study Committee, March 1972, pp. 42, 35-38, 50 17
"Narcotics Legislation," Hearings, Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate, U.S. Government Printing Office, Washington: 1969, pp. 273-275 12
9B Uniform Laws Annotated 418 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. ____

CLEVE M. HATTERSLEY,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

Petitioner, CLEVE M. HATTERSLEY, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in this cause September 25, 1972, rehearing denied November 15, 1972.

OPINION BELOW

The opinion and judgment of the Court of Criminal Appeals of Texas is reported at 487 S.W. 2d 354 (Cr App., 1972); a copy of that opinion is attached hereto as

Appendix "A." Timely filed motion for rehearing was overruled without written opinion.

JURISDICTION

Judgment of conviction was affirmed by the Court of Criminal Appeals of Texas September 25, 1972, and motion for rehearing was overruled by the Court November 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. In classifying marijuana as a "narcotic drug" indiscriminately with coca leaves, opium and other "hard" narcotic drugs named in Section 1 (14) and providing identical penalties in Section 23, does Article 725b, Vernon's Annotated Penal Code of Texas, violate Equal Protection and Due Process clauses of the Fourteenth Amendment?

2. In the absence of a showing by the State that there is a factual nexus between proscribing possession of marijuana and promoting public health, safety and welfare, can Article 725b, Vernon's Annotated Penal Code of Texas be sustained as a valid exercise of police power?

3. Under the circumstances of the instant case, were the seizure and search of a suitcase in question prior to arrest of petitioner violative of his rights under the Fourth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Eighth Amendment to the United States Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE STATUTE INVOLVED

Article 725b, Vernon's Annotated Penal Code of Texas, provides in pertinent part:

"Section 1. The following words and phrases, as used in this Act, shall have the following meanings, unless the context otherwise requires:

* * *

(11) 'Coca Leaves' includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(12) 'Opium' includes morphine, codein, heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium, which does not include apomorphine or any of its salts.

(13) The term 'Cannabis' as used in this Act shall include all parts of the plant Cannabis Sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of such plant and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the non-resinous oil obtained from such seed, nor the mature stalks of such plant, nor any product or manufacture of such stalks, except the resin extracted therefrom and any compound, manufacture, salt, derivative, mixture, or preparation of such resin. The term 'Cannabis' shall include those varieties of Cannabis known as Marijuana, Hashish and Hasheesh.

(14) "Narcotic drugs" means coca leaves, opium, cannabis, amidone, isompecaine and every substance neither chemically nor physically distinguishable from them; also opiates, which shall mean any drug having an addiction-forming or addiction-sustaining liability similar to opium or cocaine; substances which are now listed in, or may be added subsequently to, Schedule II, Title II, Part B, Section 202, under the provisions of the Comprehensive Drug Abuse and Prevention and Control Act of 1970.

* * *

"Sec. 2. (a) It shall be unlawful for any person to manufacture, possess, have, control, sell, prescribe, administer, dispense, compound, offer to sell, or offer to buy any narcotic drug. Proof of an offer to sell must be corroborated by a person other than the

offeree or by evidence other than a statement of the offeree.

* * *

Sec. 23. (a) Except as provided in Subsections (b) and (c) of this section, any person who violates any provision of this Act is guilty of a felony and upon a conviction is punishable by imprisonment in the penitentiary for not less than two years nor more than life; and upon a second or subsequent conviction, he is punishable by imprisonment in the penitentiary for not less than 10 years nor more than life. Suspended sentence or probation under the Adult Probation and Parole Law is not available to a person upon a second or subsequent conviction.

* * *

STATEMENT OF THE CASE

Challenge to Article 725b, V.A.P.C.

The indictment on which petitioner was tried and convicted alleged that on or about August 31, 1970 he "did then and there unlawfully possess a *narcotic* drug, to-wit: Marijuana."[1] Before trial and by motion to quash indictment, petitioner challenged the constitutional validity of Article 725b, V.A.P.C., *supra*, upon which the indictment was based. *Inter alia*, he asserted that "inclusion of marijuana as a variety of cannabis and of cannabis as a 'narcotic drug' indiscriminately with coca leaves, opium, and other 'hard' drugs named in Section 1(14) with identical penalties provided in Section 23 is arbitrary, unreasonable and irrational and a denial of due process and equal protection of law. . ." and that "the Act as it relates to private possession of marijuana is beyond the police power of the State of Texas in the absence of a

[1]All emphasis is supplied throughout by the writer of this petition unless otherwise indicated.

showing by the State that there is a factual nexus between proscribing such private conduct and promoting public health, safety and welfare." The trial court overruled the motion, presumably because similar contentions have been made and uniformly rejected by the Court of Criminal Appeals of Texas.[2] After his conviction and subsequent to filing his appellate brief, the decision of the Supreme Court of Illinois in *People v. McCabe*, 49 Ill.2d 338, 275 N.E. 2d 407 (Ill. 1971) became known and was considered by the Court of Criminal Appeals in *Sanders v. State*, 482 S.W.2d 648, 651-652 (Cr. App., 1972), but the Court was "not persuaded," preferring the dissenting opinion of Chief Justice Underwood in *McCabe* "as being more sound than that of the majority." Quoting from that dissenting opinion, the *Sanders* Court emphasized, "in the absence of more nearly conclusive evidence that the legislative judgment was devoid of any rational basis, a finding of unconstitutionality is unwarranted. . ." Believing that the Court of Criminal Appeals was applying the wrong test and, in any event, ignoring "nearly conclusive evidence," petitioner renewed his challenge to the constitutionality of Article 725b with respect to possession of marijuana, on motion for rehearing, asserting the grounds set forth in questions 1 and 2, *supra*. However, adhering to its position in *Sanders*, the Court of Criminal Appeals overruled motion for rehearing.

Challenge to Seizure and Search

Also before trial petitioner filed and presented his motion to suppress "all evidence obtained from his person and from a Braniff International airplane wherein he was situated," contending that the intrusion upon his privacy

[2] See, e.g., *Broom v. State*, 463 S.W.2d 220, 222 (Cr. App. 1971); *Miller v. State*, 485 S.W.2d 681 (Cr.App. 1970); and *Reyna v. State*, 434 S.W.2d 362, 366 (Cr. App. 1968).

was "without lawful authority, without probable cause and without a valid search warrant." After a pre-trial hearing on the motion, the trial court denied it. Then, on trial, objection to admitting the suitcase and its contents "for all the reasons heretofore stated in our motion to suppress" was denied and the exhibits admitted in evidence. Brief of Appellant in the Court of Criminal Appeals of Texas assigned error in overruling that portion of motion to suppress contending and in admitting the exhibits into evidence over objections to the effect that "the seizure and search of the suitcase was 'without probable cause' and therefore violative of the Fourth Amendment to the United States Constitution. . ." These grounds of error were overruled by the Court of Criminal Appeals; they were renewed on motion for rehearing and again overruled.

Statement of Facts

Three lay witnesses testified at hearing on motion to suppress. Two of those three and a police officer who had not testified at pretrial, testified at trial. Thus, on critical points regarding probable cause for seizure and search, the testimony varied from one hearing to trial and, as can be demonstrated on a fuller exposition, became inconsistent and conflicting.

Suffice it for present purposes to say that on pretrial hearing it was developed that at the instance of two customer service employees of Braniff International Airways, the Austin Municipal Airport Manager for Braniff observed in a partially opened suitcase among other baggage cellophane wrappers around brown paper wrapped packages and "decided to call the authorities." This was "the first time" the Braniff Manager had occasion to call the authorities; indeed, he called the office of the Federal Bureau of Investigation and someone there

referred him to the head of Special Services Detail of the Austin Police Department. Responding to that telephone call, the Austin officer contacted the Braniff Manager at the latter's terminal office; they went to a waiting Braniff airplane where the suitcase, having meanwhile been taken to the plane, was removed from the baggage compartment and opened. The Austin officer then tore into one of the cellophane wrapped brown paper packages, felt and smelled the substance therein, and then boarded the airplane with a Braniff employee who pointed out petitioner as the person that had checked the suitcase.

At trial the Austin officer testified to receiving the call from Braniff's Terminal Manager and going to the Austin Municipal Airport where he contacted the Manager, testifying "I think I knew him, but I am not sure." Over objection the officer was then permitted to give his version of a conversation he claimed to have had with another Braniff employee on the way to the airplane,[3] and what the officer "felt" as to the reliability of "the Braniff personnel" regarding their knowing and identifying marijuana.[4]

Without any doubt, seizure and search of the suitcase preceded identification and arrest of Petitioner.

REASONS FOR GRANTING THE WRIT

[3]That Braniff employee disclaimed saying anything to the Austin officer, surmising that his supervisor, Braniff's Terminal Manager, had already told the officer what the situation was, "So we immediately took him on out to the airplane."

[4]A critical portion of the testimony admitted over objection was "I know that they have experience with marijuana. We have had calls from out there before and I didn't — I don't recall having posed the question, because I felt certain that they were aware of what marijuana was; and, if I posed the question as to how they knew it, I don't recall."

I.

INDISCRIMINATELY INCLUDING MARIJUANA WITH DANGEROUS NARCOTIC DRUGS AND PROVIDING IDENTICAL PENALTIES FOR THEIR POSSESSION IS AN UNREASONABLE AND DISCRIMINATORY LEGISLATIVE SCHEME THAT POSES SERIOUS AND TIMELY CONSTITUTIONAL QUESTIONS THAT NEED RESOLUTION.

The Unreasonable Classification

The drug laws of Texas, like Topsy, just "grow'd." The first State statute revealed through research, Acts 1905, p. 45, prohibited selling or distributing cocaine, morphine, opium and chloral hydrate and derivative preparations. Fourteen years later the prohibition was expanded to include "cannabis indicia, cannabis sativa or preparations thereof or any drug or preparation from any cannabis variety, or any preparation known as marijuana," with exceptions for medicinal purposes;[5] a violation was punishable by a fine of from $25 to $200 or jail confinement from one month to a year, or both. Not until 1931 was a "narcotic drug" act passed by the Texas Legislature, Acts 1931, 42d Leg., p. 154, ch. 97, and it included opium, morphine, heroin, cocoa leaves, cocaine and marijuana and derivative preparations. Once again provisions were made for exemptions for medicinal preparations, but penalties were increased. The enactment came under immediate judicial scrutiny in *Baker v. State*, 58 S.W.2d 534 (Cr. App., 1933) and the opinion of the court illuminates the state of knowledge concerning marijuana

[5]The prohibitions were not to apply to "preparations containing not more than one grain per ounce of solid extract of cannabis indicia, cannabis sativa or preparations therefrom or any drug or preparation from any cannabis variety . . . ."

then extant in Texas:

> "'Marijuana(marijuana),' pronounced 'merry-huana,' and called 'griefo' or 'merry' by addicts that use it, is a product of Mexican hemp. It contains a volatile drug. It is most often taken in the form of a smoke, and sometimes mixed with tobacco. It produces a high exhilaration, and when taken in excess, it motivates brutal criminality."

While the court was not prepared to vouch for its statement,[6] it did conclude, "the classification of the articles mentioned in the statute now under consideration is an arbitrary one" for the drugs named "are not all narcotics. . . .". Apparently reacting to the *Baker* opinion, the Texas Legislature amended its 1931 Act by reenacting a substantially similar substitute, Acts 1933, 43d Leg., p. 609, ch. 204, effective September 6, 1933.[7] See generally Articles 720-725 and Article 725a, Vernon's Texas Penal Statutes, 1936 edition.

Meanwhile the National Conference of Commissioners on Uniform State Laws struggled with its project for a uniform act governing narcotic drugs.[8] Its early drafts eschewed the term "narcotic drugs" in favor of

[6] "We have no authentic information touching the drug last mentioned above. No reference to it either in the dictionary or the encyclopedia has been discovered. The foregoing is from a statement in a magazine and the accuracy of the statement is vouched for by the members of the Court."

[7] *Spangler v. State*, 117 S.W.2d 63 (Cr.App., 1938) appears to be the only appellate opinion dealing with the 1933 Act, but it does not determine the validity of that Act.

[8] Reports of recommendations and proceedings are contained in a volume published annually entitled "Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings," hereinafter cited by year of handbook and page number in that volume.

"habit-forming drugs" and included one form or another of cannabis, 1925 Handbook 975-976, 978; 1928 Handbook 322-323, 325; 1929 Handbook 333. In 1930, however, a third tentative draft no longer included cannabis as a "habit-forming drug" but covered it ina separate section because, as the Committee on Uniform Narcotic Drug Acts reported:

> "Note: Because of many objections raised to the inclusion of cannabis indicia, cannabis americana and cannabis sativa in the general list of habit-forming drugs, *no mention is made of them in other sections of this act.* * *

1930 Handbook 485, 487, 493. Neither this nor the next several drafts submitted were approved for reasons that appear in the proceedings, 1930 Handbook 126-127; 1931 Handbook 390, 392, 398-399. Finally, after much debate on matters other than cannabis, a fifth draft was approved, 1932 Handbook 95-107. The Uniform Narcotic Drug Act thus adopted substituted "narcotic drugs" for "habit-forming drugs;" cannabis was not included but a note suggested ways to include cannabis if "it is desired," 1932 Handbook 325-326. The act, as adopted, was not amended or revised until 1942, when the current definition of cannabis was inserted, 9B Uniform Laws Annotated 418 "Historical Note." Thus it was that commissioners on uniform state laws composed of representatives from all states, including Texas, began their work with the notion that cannabis was a "habit-forming drug" but 10 years later, after dropping that term in favor of "narcotic drug" determined that cannabis did not necessarily come under that characterization and declined to include it, expressly leaving its inclusion optional if "it is desired."

In 1937 the Legislature of Texas exercised its options. Curiously enough, the bill that was to become Article 725b, Acts 1937, 45th Leg., p. 333, ch. 169, H.B. No. 440, did not

include either cannabis or marijuana as originally introduced — only "cocoa leaves, cocaine, opium, morphine, codeine, heroin and any compound. . ." etc., House Journal p. 328. Inclusion of cannabis as one of the "narcotic drugs" named in section 1, subsection (14) and definition of cannabis as set forth in section 1, subsection (13), *supra*, occurred in a so-called committee amendment that was actually a complete substitute, the text of which is shown in House Journal p. 1543. What moved the committee to include cannabis cannot be ascertained from official records of the Legislature since proceedings of hearings were not, and are not, recorded; but a still respectable newspaper, "The Houston Post," reported in its March 12, 1937 issue that at the committee hearing:

> "James B. Biggins, Federal narcotic bureau official, said 'Texas is one of the worst States in the Union in dope selling' and 'Houston is one of the worst cities in the country.'
>
> "He charged that use of the Mexican *narcotic* weed, marihuana, is increasing, . . ."[9]

The Court of Criminal Appeals of Texas did not have occasion to investigate inclusion of marijuana as a "narcotic drug" in early cases arising from the 1937 Act.[10] Then, in *Fawcett v. State,* 127 S.W.2d 905, 906 (Cr. App., 1939) the court rejected a motion to quash indictment in a possession of marijuana case, stating a proposition from which it has never retreated:

[9]Compare similar tactics employed on the Congress of the United States in 1937 as recounted by Dr. Stanley F. Yolles, Director, National Institute of Mental Health to the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate, "Narcotics Legislation," Hearings, U.S. Government Printing Office, Washington: 1969, pp. 273-275.

[10]See, e.g., *Valdez v. State,* 117 S.W.2d 459 (Cr. App., 1938) and *Ramirez v. State,* 125 S.W.2d 597 (Cr. App., 1938).

"The term 'cannabis' is denominated as a narcotic drug under Art. 725b, Vernon's Ann. P.C., and the term 'cannabis' under said statute includes those varieties of cannabis known as marijuana. Consequently, marijuana is classed as a narcotic drug."

Thus the Court of Criminal Appeals of Texas has never really examined the constitutional questions raised from time to time, being simply content to defer to the ancient legislative pronouncement that marijuana is a narcotic drug.[11]

Elsewhere, in 1970 Congress revised and modernized its laws treating possession of marijuana as well as other drugs. State laws came under close scrutiny from legislative and judicial eyes, and were found wanting. Successful attacks were made against the notion of judicial approval of a classification of marijuana as a narcotic on the strength of legislative imprimatur alone.[12]

[11]See, e.g., *Hernandez v. State*, 129 S.W.2d 301 (Cr. App., 1939); *Fletcher v. State*, 282 S.W.2d 230 (Cr. App., 1955); *Gonzales v. State*, 293 S.W.2d 786 (Cr. App., 1956); *Gonzales v. State*, 323 S.W.2d 55 (Cr. App., 1959); *Locke v. State*, 329 S.W.2d 873 (Cr. App., 1959); *Massiate v. State*, 365 S.W.2d 802 (Cr. App., 1963); "Whether the marijuana plants were narcotic drugs, the possession of which is unlawful, does not rest upon the biologist's or chemist's definition or classification, but upon the statute under which this prosecution was had;" *Capuchino v. State*, 389 S.W.2d 296 (Cr. App., 1965); *Reyna v. State*, 434 S.W.2d 362, 366 (Cr. App., 1968); *Miller v. State*, 458 S.W.2d 680, 684-685 (Cr. App., 1970); *Curry v. State*, 459 S.W.2d 644 (Cr. App., 1970); *Broom v. State*, 463 S.W.2d 220, 222 (Cr. App., 1970).

[12]*Leary v. United States*, 395 U.S. 6, at 38, fn. 68 (1969) may have provided the impetus:

"A statute based upon a legislative declaration of facts is subject to constitutional attack on the grounds that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to reexamine the factual declaration (citing cases)."

The Supreme Court of Washington in *State v. Zornes*, 469 P.2d 552, 560 (Wash., 1970), recently addressed itself to this very issue. After reviewing many of the scientific treatises on the distinctions between the effects of marijuana and "hard drugs," the Court said:

> "The fact that the legislature did, in another act, define it as a 'narcotic drug' did not change its nature and give it properties which it does not possess. . .It is doubtful whether a legislative declaration contrary to all the evidence can be sustained as constitutional if its effect is to deny to a defendant equal treatment under the law."

Legislation bottomed upon exercise of police power, even if legitimate when made, is invalid where later events and experience show that it has become arbitrary or unreasonable. *Abie State Bank v. Weaver*, 282 U.S. 765, 772, 51 S.Ct. 252, 255 (1931). Clearly, where the legislation based upon the police power is later shown to be based upon myths and erroneous factual considerations, it is invalid.

In a number of recent cases, the rationality of certain drug statutes and their sanctions has been examined by the courts in light of modern scientific, psychological and sociological understanding. Where the factual basis or conceptual framework has been found wanting or nonexistent, the statute has been invalided. Thus in *English v. Miller*, 341 F. Supp. 714 at 717-718 (E.D. Va., 1972), a federal court invalidated Virginia's classification of marijuana as a narcotic, holding: "The classification of marijuana as a narcotic is, in this Court's opinion, violative of the equal protection clause of the United States Constitution." Several state supreme courts have agreed and invalidated their own marijuana laws.

In *People v. McCabe*, 49 Ill.2d 338, 275 N.E.2d 407

(1971), it was argued that classifying marijuana under the narcotic drug act rather than under the Drug Abuse Control Act with the stimulant or depressant drugs was constitutionally an improper classification, considering the present state of knowledge concerning the comparative nature and effects of the drugs named in the two statutes. The Court agreed with the contention that there was no rational basis for distinguishing a first sale of marijuana from a first sale of stimulant or depressant drugs under the Drug Abuse Control Act and that the gross disparity between the penalties violated his rights under the Equal Protection Clause. 275 N.E.2d at 408-409.

The plurality decision in *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972) held that the statutory classification of marijuana along with "hard drugs" for purposes of imposition of penalties denied equal protection of the laws. The denial of equal protection of the laws is brought about by the classification of marijuana with hard drugs for it is arbitrary and unreasonable for there exists ample scientific proof that the marijuana is less dangerous than barbiturates, amphetamines and any other hallucinogens. 194 N.W.2d at 881-87. The more persuasive of the findings are:

> "Comparison of the effects of marijuana use on both the individual and society with the effects of other drug use demonstrates not only that there is no rational basis for classifying marijuana with the hard narcotics; but, also that there is not even a rational basis for treating marijuana as a more dangerous drug than alcohol.
>
> * * *
>
> We agree with the Illinois Supreme Court in *People v. McCabe, supra,* that marijuana is improperly classified as a narcotic and hold that M.C.L.A.

§335.31; M.S.A. §18.1121, and its classification of marijuana violates the equal protection clauses of the United States Constitution, Amendment XIV. . . ."

A concurring opinion by Justice Williams found that the Michigan statute classifying marijuana as a narcotic was invalid under either the rational basis test of *Lindsay v. National Carbonic Co.*, 220 U.S. 61 (1911), or compelling governmental interest test of *Shapiro v. Thompson*, 394 U.S. 618 (1969).

In *Sam v. State*, ____ Okla. _____, 500 P.2d 291, 11 Crl. Law 2530 (Okla. Cr. App., 1972) Oklahoma agreed with the Illinois decision in *McCabe, supra,* and Hawaii probably would have done so in *State v. Kantner,* 493 P.2d 306 (Haw., 1972) but for a disabling concession by appellant there; see concurring opinion of Justice Abe and dissenting opinions of Justice Levinson and Kobayashi.

Thus recognition of reality in light of scientific and medical findings as to the true nature and characteristics of marijuana has impelled the Congress, most legislators, at least one federal court and several state supreme courts to treat marijuana in a rational, reasonable manner that does not impinge on constitutional guarantees. But, for its part, Texas clings to early myths and argumentative distortions to deny due process and equal protection assurances, proclaiming "We are not persuaded," *Coyne v. State,* 485 S.W.2d 917, 920 (Cr. App., 1972); *Sanders v. State,* 482 S.W.2d 648, 651 (Cr. App., 1972).

We submit that this case, like another presently pending,[13] raises serious constitutional questions of major

[13]The "classification" question in the Ohio drug statute is presented in a petition for certiorari filed September 13, 1972, in No. 72-425: *McDonald v. Ohio,* and at last report we were given to understand that Ohio has been requested to respond to the petition.

import.[14]

The Discriminatory Penalties

As shown above courts have found that accepted scientific and medical evidence overwhelmingly establishes that statutes similar to the Texas statute arbitrarily classify marijuana in the same category as dangerous narcotic drugs. The result of this arbitrary classification is to subject Petitioner to a discriminatory penalty in violation of the Equal Protection Clause.

First offense possession of marijuana is punishable under the Texas statute for not less than two years nor more than life, Art. 725b, Sec. 23(a). In contrast, Texas has provided penalties for possessing such dangerous drugs as barbiturates and amphetamines at a fine of not more than $3,000, jail confinement for not less than 30 days nor more than two years, or both, Art. 726d, Sec. 15(a). Thus penalties imposed upon Petitioner violate the Equal Protection Clause in at least two respects: They are much more severe than penalties for possessing drugs such as barbiturates and amphetamines that are much more dangerous than marijuana and, secondly, they are equally severe as penalties for possessing narcotic drugs such as heroin and cocaine, that are much more dangerous than marijuana. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and *McLaughlin v. Florida*, 379 U.S 184 (1964). The principle in both cases is that it is "invidious

[14]Obviously favorable resolution of the questions presented is of utmost importance to Petitioner himself, but more significantly to some 700 youths who have been convicted of marijuana possession and are confined in the Texas Department of Corrections, to the unknown thousands who have been arrested for marijuana possession in Texas and the minimally estimated 800,000 Texas citizens who use it, "Marijuana in Texas," A Report to the Senate Interim Drug Study Committee, March 1972, pp. 42, 35-38, 15.

discrimination" when the state "lays an unequal hand on those who have committed intrinsically the same quality of offense. . . ." [15]

It would also seem to be a necessary corollary of *Skinner* and *McLaughlin,* if not a clear mandate of the Equal Protection Clause, that a state may not impose the same penalties for offenses that are of intrinsically different quality. In other words, a state may not, as Texas has done, impose the same sentences for marijuana offenses as for narcotic drug offenses which are intrinsically more dangerous. As the court stated in *Skinner*, "The Equal Protection Clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn," 316 U.S. at 542. Here, due to the "conspicuously artificial lines" of an overly broad statute, Petitioner, convicted of a marijuana offense, has been made to suffer the very same harsh penalty that is attendant upon offenses involving extremely more dangerous narcotic drugs. This "equal treatment of unequals" constitutes invidious discrimination for which there is no justification. See *State v. Zornes*, 469 P.2d 552 at 560 (Wash., 1970) and *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 828 at 894 (Mich., 1972).

In sum, it appears that there is no state interest, compelling or reasonable, that can justify discriminatory punishment such as inflicted upon Petitioner here. The Texas court has decided the issue in a way probably not in accord with applicable decisions of this Court and grant of certiorari is appropriate to resolve the federal question of

[15]As the plurality opinion in *McCabe, supra,* held: "We do not find a rational basis for the classification, a consequence of which is that one first convicted of the sale of marijuana must without qualification receive a sentence ten times greater than one permitted to be imposed upon one convicted for the first time of a sale of drugs under the Drug Abuse Act."

substance thus presented.

II.

THIS CASE RAISES A SIGNIFICANT QUESTION CONCERNING APPLICATION OF FOURTH AMENDMENT REQUIREMENTS TO A WARRANTLESS SEARCH BASED UPON A "FIRST TIME" INFORMANT.

It is now well settled that "the standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment," *Whiteley v. Warden,* 401 U.S. 560, 91 S.Ct. 1031 (1971); *Beck v. Ohio,* 379 U.s. 89, 85 S.Ct. 223 (1964). Since the seizure and search in the instant case preceded the arrest, application of the settled rule means that the tests of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, as further explicated in *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584 (1969) must be met. We urge that the competent testimony, particularly on motion to suppress, does not provide enough information to support issuance of a search warrant.[16] It was "a first time" telephone call from one acting on suspicions of two others regarding contents of brown paper bags wrapped in plastic containers in a partially opened suitcase — contents no one had actually seen before the Austin officer tore into one of the brown bags, extracted some substance and felt and smelled it. Missing

[16]Petitioner strongly challenges accuracy of the findings recited on the first page of the opinion of the Court of Criminal Appeals of Texas and will urge this Court to "make an independent examination of the whole record," *Edwards v. South Carolina,* 372 U.S. 229, 235, 82 S.Ct. 680, 683 (1963) to make certain that the principles of the Fourth Amendment have been constitutionally applied.

in the equation are "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable'." The officer's later statement of what he "felt" concerning the reliability of the "Braniff personnel" is no more than "a bare statement by an affiant that he believed the informant to be truthful" and does not provide "a *factual* basis" for crediting it, *United States v. Harris*, 403 U.S. 573, 579, 91 S.Ct. 2075, 2080 (1971).

Thus, a serious constitutional question of substance is raised that calls for determination by this Court to the end that law enforcement officers, the courts and litigants alike can confidently confront and resolve problems involving a warrantless seizure and search.

CONCLUSION

For these reasons Writ of Certiorari should issue to review the judgment of the Court of Criminal Appeals of Texas.

Respectfully submitted,

CLINTON & RICHARDS
600 West 7th Street
Austin, Texas 78701

By:_____
Sam Houston Clinton, Jr.

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, Sam Houston Clinton, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been personally served on counsel for Respondent by delivery thereof to the office of Hon. John Hill, Attorney General of Texas, Supreme Court Building, Austin, Texas, and at the office of Hon. Robert O. Smith, Travis County District Attorney, Travis County Courthouse, Austin, Texas, this 14th day of February, 1973.

SAM HOUSTON CLINTON, JR.

APPENDIX

APPENDIX "A"

CLEVE M. HATTERSLEY, Appellant

NO. 45,192 v. Appeal from Travis County

THE STATE OF TEXAS, Appellee

O P I N I O N

The offense is possession of marijuana; the punishment, seven (7) years.

Trial was before the court without the intervention of a jury.

Braniff ticket agent James Barry testified that just prior to 9:00 a.m. on August 31, 1970, the appellant bought a ticket under the name "J. English" for a flight to Newark, New Jersey, departing at 9:00 a.m. Barry checked in the appellant's suitcase, which was tied at one end with a string and attached a claim check for it to the appellant's ticket. When Barry next observed the suitcase, in the baggage room, "the string had popped open" and the contents were clearly visible without manual intervention by the attendants. Barry and Braniff agent Joseph Wilkinson, who was also present in the baggage room, stated that they saw the suitcase contained plastic bags with brown bags inside them. They detected an odor of cosmetic powder and then an odor of marihuana emanating from the luggage. They testified they recognized the odor of marihuana from previous occasions when they discovered similar substances which narcotics officers later identified as marihuana. The suitcase

containing the suspected contraband was sent to the airplane, with the string still untied, while Barry and Wilkinson reported their findings to their superior who in turn notified Captain Harvey Gann of the Austin Police. When Gann arrived at the airport he verified the agents' conclusion, seized the contraband, and arrested the appellant.

The facts and circumstances of this case are very similar to those in *Chaires v. State,* 480 S.W.2d 196. That offense, which occurred the day after the instant events, also concerned the discovery of marihuana at Austin Municipal Airport and involved practically the same airline agents and police officers.

Appellant's first two grounds of error relate to probable cause to search the appellant's suitcase. Some years ago in *Heath v. State,* 276 S.W.2d 534, this court discussed the rule earlier announced in *Crowell v. State,* 180 S.W.2d 343, that "if one is foolish enough to leave his windows uncurtained he may not complain if another . . . observed an illegal act being committed therein." Cf. *Thompson v. State,* 447 S.W.2d 175, cert. denied 90 S.Ct. 1709, 398 U.S. 912, 26 LEd.2d 73. We say here that if one is careless enough to carry contraband in a faulty suitcase he may not complain if another observes the contraband when the bag opens itself by its own weight. Further,

> "After the Braniff employees, by sight and smell, determined that the bags contained marihuana, and reported their findings to the police, the police, upon seeing the bags and smelling the contraband, clearly had probable cause to seize the luggage and to arrest the offenders." *Chaires v. State,* 480 S.W.2d 196.

Appellant's third contention challenges the warrantless search of his luggage by the police. He claims that the officers should have obtained a search warrant. The same

contention was raised in *Chaires v. State,* 480 S.W.2d 196, where we concluded that:

> "It is uncontested that the airliner was scheduled to leave for Washington, D.C., at 9:00 a.m., and that the entire episode began shortly after 8:30 a.m. when appellant arrived at the airport. We, therefore, find no merit in appellant's contention that since the Austin police knew the craft would be continually airborne for over two and one half hours, they should have refrained from action and instead wired their suspicions ahead to Washington, D.C., officials. Likewise, we find no merit in his other contention that since the airline officials had the authority to withhold the luggage from the flight, they should have done so, and thereby afforded officials an opportunity to obtain a warrant. Such an approach disregards the practical aspects of law enforcement. When the Austin police were informed that the contraband was abord an airliner, due to depart in minutes, they had probable cause to inspect the suspect cargo and, after verifying the agents' suspicions, to seize it and arrest its owners, before one or all were flown from their jurisdiction."

Ground of error number four relates to the court's failure to strike Captain Gann's testimony concerning his subjective opinion about the reliability of witnesses Barry and Wilkinson. Since this was a trial before the court, we may assume that the court did not consider any inadmissible evidence. *Larocca v. State,* 479 S.W.2d 669. The evidence reflects sufficient probable cause.

Ground of error number five contends that the evidence in insufficient to show appellant knew the suitcase contained marihuana. Barry testified, as noted earlier, that he attached a claim check to the appellant's ticket for the

suitcase which the appellant checked in. The State introduced the suitcase and the ticket into evidence. The number on the claim check of the ticket and the number on the suitcase are identical. The evidence is sufficient to show the appellant owned the luggage and possessed the contraband.

Ground of error number six is that the judgment is based upon demonstrably false testimony. The appellant discusses, at some length, what he considers is a conflict in the testimony. Nowhere does he mention the fact that the suitcase in the case at bar opened itself thereby displaying to the world the marihuana it contained. This suitcase was connected to the appellant by the evidence that he had checked it in and retained the claim check for it. The trial judge had before him sufficient evidence to support this conviction, and it will be presumed that he resolved any conflict in the testimony. We find that there was sufficient evidence before the court to establish the appellant was guilty of the crime charged. *Montes v. State*, 473 S.W.2d 34.

The judgment is affirmed.

Morrison, Judge

(Delivered September 25, 1972)

APPENDIX "B"

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
OF TEXAS

AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 45,192 styled:

CLEVE M. HATTERSLEY, Appellant

vs.

STATE OF TEXAS, Appellee

judgment of the 147th JUDICIAL DISTRICT COURT OF TRAVIS County, Texas, was affirmed on SEPTEMBER 25, 1972, Appellant's Motion for Rehearing was overruled, without written opinion, NOVEMBER 15, 1972, and on DECEMBER 19, 1972 mandate issued.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on NOVEMBER 15, 1972, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas, this the 15th day of FEBRUARY, A.D. 1973.

GLENN HAYNES, Clerk of the Court
of Criminal Appeals of Texas

Seal